

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND ) MDL NO. 13-02419-FDS  
COMPOUNDING )  
PHARMACY CASES LITIGATION )  
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE

John Joseph Moakley United States Courthouse  
Courtroom No. 13  
One Courthouse Way  
Boston, MA 02210

November 7, 2013  
1:30 p.m.

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Official Court Reporter  
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One Courthouse Way, Room 3204  
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2     Tim Housholder  
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34    VIA PHONE FOR THE DEFENDANTS:

35    Stephen A. Grossman  
36    Nichole Dorman

PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of in re: New England Compounding Pharmacy, Incorporated Products Liability Litigation. This is Case No. 13-md-02419. Counsel for the plaintiffs' steering committee, please note your appearance for the record.

MS. PARKER: Good afternoon, your Honor, Kristen Johnson Parker from Hagens, Berman, Sobol, Shapiro for the plaintiffs' steering committee.

THE COURT: Good afternoon.

MR. GASTEL: Good afternoon, your Honor, Ben Gastel from Branstetter, Stranch & Jennings in Nashville for the plaintiffs' steering committee.

THE COURT: Good afternoon.

MS. DOUGHERTY: Good afternoon, your Honor, Kim Dougherty from Janet, Jenner & Suggs on behalf of the plaintiffs' steering committee.

MR. CHALOS: Mark Chalos on behalf of the plaintiffs' steering committee.

MR. FENNEL: Patrick Fennell for the plaintiffs' steering committee, your Honor.

THE CLERK: The back table there.

MR. BALDIGA: Good afternoon, your Honor, William Baldiga of Brown, Rudnick for the creditors'

1 committee.

2 MR. COREN: Good afternoon, your Honor,  
3 Michael Coren, Cohen, Placitella & Roth on the official  
4 creditors' committee.

5 MS. TAYLOR: Good afternoon, your Honor,  
6 Kiersten Taylor from Brown, Rudnick for the creditors'  
7 committee.

8 MR. GOTTFRIED: Michael Gottfried for the  
9 trustee, Paul Moore.

01:32PM 10 MR. STEIN: Callan Stein for Barry and Lisa  
11 Cadden.

12 MR. FERN: Good afternoon, Judge,  
13 Frederick Fern on behalf special retained counsel for  
14 the bankruptcy trustee.

15 MR. GAYNOR: Your Honor, Robert Gaynor,  
16 Sloane and Walsh on behalf of the so-called insiders.

17 MR. RABINOVITZ: Dan Rabinovitz on behalf of  
18 Medical Sales Management, Inc.

19 MR. TRANEN: Daniel Tranen for the trustee.

01:32PM 20 MR. MORIARTY: Good afternoon, your Honor,  
21 Matthew Moriarty for Ameridose.

22 THE COURT: All right. Good afternoon,  
23 everyone. We also have some number of people on the  
24 telephone. We're meeting today in this courtroom  
25 because the electronics in my courtroom were upgraded

1 about a week and a half ago, as a result of which, they  
2 were completely knocked out, and there's a metaphor for  
3 modern life of some sort, but, in any event, it's going  
4 to be some time before I'm back in my courtroom.

5 I have before me the jointly proposed  
6 agenda, which, again, I intend to follow. There are, I  
7 think, a few motions pending, which I'll take up along  
8 the way, but why don't we start. Let me hear from the  
9 PSC concerning subpoenas and objections.

01:33PM

10 MS. PARKER: Thank you, your Honor. As the  
11 Court and many of those in the courtroom are aware,  
12 Magistrate Judge Boal held a hearing this morning where  
13 she heard oral objections to the subpoenas served by the  
14 plaintiffs' steering committee back in June. I think it  
15 was a very effective hearing. Judge Boal indicated that  
16 we were likely to receive an order from her relatively  
17 soon, and we look forward to her decision on many of  
18 those matters.

01:34PM

19 By way of informing the Court, the  
20 plaintiffs' steering committee was asked to provide a  
21 list of pain clinics who are objecting to subpoenas who  
22 are named defendants in the MDL currently, and we will  
23 provide that list to Magistrate Judge Boal by next week.

24 THE COURT: All right. Does anyone else  
25 want to report on or be heard on the subject of



1 subpoenas or objections? All right. Let's go item 2,  
2 status of mediation efforts.

3 MS. PARKER: Your Honor, could we save that  
4 for later in the agenda possibly?

5 THE COURT: Yes.

6 MS. PARKER: Thank you.

7 THE COURT: Item 2, master plaintiffs and  
8 responsive pleadings.

9 MS. PARKER: The plaintiffs' steering  
01:34PM 10 committee filed on November 5th a master complaint. We  
11 also filed with the master complaint a short form  
12 complaint, and with the Court's permission and as much  
13 for the benefit of the attorneys on the phone, I'd like  
14 to explain a little bit about how those two documents  
15 work together.

16 THE COURT: All right.

17 MS. PARKER: The master complaint is  
18 designed to be an administrative tool that aids  
19 plaintiffs' counsel. It was intended to replace or  
01:35PM 20 supersede the complaints currently on file in existing  
21 civil actions. Plaintiffs and their attorneys will have  
22 an opportunity to sign onto the facts and allegations  
23 set forth in the master through the short form complaint  
24 mechanism, so the master complaint standing on its own  
25 serves to provide a factual basis and sample counts for

1 individual plaintiffs, but it is administrative in  
2 nature only.

3 The short form complaint filed with the  
4 master is a template complaint that will be provided to  
5 plaintiffs' attorneys in a workable file format. That  
6 provides an opportunity for counsel to sign onto or to  
7 adopt particular counts and facts as alleged in the  
8 master complaint.

01:36PM 9 The current court schedule contemplates that  
10 for plaintiffs with cases currently on file in the MDL,  
11 that they shall have until November 29th in order to  
12 file short form complaints. That November 29th deadline  
13 also applies currently to cases that wished to be  
14 considered for bellwether status down the road, but it  
15 is not as currently ordered by the Court a deadline for  
16 all plaintiffs to file short form complaints.

17 The plaintiffs' steering committee will be  
18 making efforts to circulate the Word version of the  
19 short form complaints widely to all plaintiffs' counsel  
01:36PM 20 who may have clients who wish to use that mechanism, and  
21 we will be making educational efforts and outreach  
22 efforts to ensure that we have distributed that  
23 information as to the current deadlines as widely as  
24 possible.

25 THE COURT: Remind me, several things, I

1 guess. A complaint that is currently on file, if  
2 plaintiffs' counsel elects, as, frankly, I hope that  
3 they will, to adopt the short form complaint, which is  
4 in effect amending their complaint, presumably that  
5 would moot any then pending motion to dismiss, and we  
6 would start that clock all over again. That's normally  
7 what would happen with the filing of an amended  
8 complaint.

9 MS. PARKER: That's correct, your Honor, and  
01:37PM 10 that is what we would anticipate as well.

11 THE COURT: And I forgot to check on the  
12 terms of the order. When are responses due, answers or  
13 responsive pleadings?

14 MS. PARKER: Currently MDL Order Number 7  
15 contemplates that a filing of master answers or motion  
16 to dismiss the master complaint would be due -- by those  
17 defendants named in the master complaint would be due on  
18 December 2d.

19 THE COURT: That's only as to the master  
01:38PM 20 complaint itself?

21 MS. PARKER: That's correct, your Honor, and  
22 there is something I think worth discussing in that. On  
23 the one hand, plaintiffs would be eager to have that  
24 deadline stick. On the other, we realized in the  
25 process of drafting the master complaints that some of

1 the defendants named, in fact, virtually all of the  
2 defendants named in the master complaint have not been  
3 sued in a civil action pending in this MDL, which is to  
4 say that they may not be aware of these existing  
5 deadlines and that they will not be formally sued or  
6 receive service of the complaint until after a short  
7 form complaint is filed naming them in an individual  
8 civil action and then service is effectuated from there.

9 So one thing that had occurred to the  
01:38PM 10 plaintiffs' steering committee, even though we  
11 certainly, we like that December 2d date, is that out of  
12 fairness, it may be appropriate to consider revising  
13 that date, waiting to see which defendants are in fact  
14 named in short form complaints filed by November 29th  
15 and having the PSC and those named defendants meet and  
16 confer as to an appropriate briefing mechanism, meaning  
17 a way for us to identify and deal with either a motion  
18 to dismiss the master or a way to brief in some  
19 manageable and efficient way those cross-cutting issues.

01:39PM 20 THE COURT: My inclination is to extend that  
21 date at least past the date of the subsequent status  
22 conference, that is past December 13th, so, if nothing  
23 else, we can see how this sorts itself by then and then  
24 resolve the issue at that point, and I may be inclined  
25 to do that as well with this issue of the bellwether

1 cases.

2 Again, if nothing else, to put that issue on  
3 hold while it sorts itself out. I note that the master  
4 complaint names, is it, Liberty and UniFirst I think is  
5 defendant in all cases? If they have been served in  
6 other cases, I'm not aware of it.

7 MS. PARKER: I am not aware of that either,  
8 your Honor. I believe that they have not been named in  
9 a case currently pending in the MDL.

01:40PM 10 THE COURT: Does anyone else want to address  
11 the issue of the master complaint, short form complaint  
12 or anything else that we've been discussing?

13 MR. GROSSMAN: Good afternoon, your Honor,  
14 this is Steve Grossman of Montgomery, McCracken who  
15 represents Speer Medical Centers.

16 THE COURT: Yes.

17 MR. GROSSMAN: We had sort of a different  
18 approach in terms of perhaps extending the deadline with  
19 which to file answers to the master complaint, and it  
01:40PM 20 arises out of a recent order that was entered by your  
21 Honor which extends the deadline for filing of a master  
22 complaint as it relates to the affiliated defendants --

23 THE COURT: Yes.

24 MR. GROSSMAN: -- as well as the mediating  
25 parties.

1 THE COURT: Yes.

2 MR. GROSSMAN: And as a result of that, we  
3 are sort of stuck in a conundrum where, to the extent  
4 that we are to file a responsive pleading on  
5 December 2d, we were hopefully contemplating simply  
6 filing cross-claims against the affiliated defendants,  
7 but, as you know, they are not currently named.

8 We think, and would certainly like  
9 clarification from the Court, that we would then be in a  
01:41PM 10 position to be forced to file third-party complaints  
11 against the affiliated defendants since they are not  
12 part of the master complaint at this point, which would  
13 obviously, you know, create a burden and an expense on  
14 the unaffiliated defendants and may invite multiple  
15 third-party complaints since I believe that we would all  
16 be in a similar situation.

17 THE COURT: I would like to avoid that.

18 MR. GROSSMAN: Yes, so my recommendation or  
19 my proposal to the Court is since the order that you  
01:42PM 20 entered now takes an amendment against the affiliated  
21 defendants until December 20th, we were requesting that  
22 the Court move back the December 2d answer date until  
23 January, I think I picked January 10th, which would  
24 allow, I think, all the issues that Ms. Parker just  
25 raised to unfold as well as allow us to see what the PSC

1 may do on or before December 20th and be in a position  
2 to simply file one responsive pleading.

3 THE COURT: All right. Do you want to  
4 respond to that, Ms. Parker?

5 MS. PARKER: Excuse me one moment, your  
6 Honor.

7 THE COURT: All right.

8 MS. PARKER: Your Honor, we have no -- we  
9 have no objection to that. Let me note, however, that  
01:43PM 10 the hope in asking the Court to extend the deadline to  
11 file a master complaint naming affiliated defendants and  
12 individuals is that in the time before that complaint is  
13 filed, there is a resolution reached with those entities  
14 so there becomes no need for a second master complaint.  
15 If that comes to pass, perhaps that deadline should be  
16 revisited, but we have no objection in principle.

17 There is one very specific Tennessee issue  
18 though that I think is raised by that proposal. Under  
19 Tennessee law, and my fellow plaintiffs' steering  
01:43PM 20 committee members can get into the specifics of that,  
21 but I understand that under Tennessee law, there's a  
22 finite period of time in which to cure particular  
23 defects that would be asserted in an answer to a  
24 complaint, and there is some concern that we may need to  
25 request relief from the Court to require answers or

1 particular information from defendants in filed cases  
2 involving the State of Tennessee.

3 Mr. Gastel, did you want to speak to that?

4 MR. GASTEL: There are a handful of  
5 affirmative defenses that were sort of running out of  
6 time to the extent that we could cure within the time  
7 provided either under the Federal Rules of Civil  
8 Procedure or under the Tennessee statute.

9 For example, I believe the Federal Rules  
01:44PM 10 gives us 120 days to serve a complaint. If there is an  
11 insufficiency of process affirmative defense, most of  
12 the Tennessee complaints were filed in September, we're  
13 sort of running out of time to cure that defect in the  
14 event that we don't have answers to the affirmative  
15 complaints, so we are continuing to work with the  
16 Tennessee defendants on this issue, but to the extent --

17 THE COURT: I'm sorry, someone on the phone  
18 is creating some noise in the background, if you can  
19 please mute your speaker. Thank you. I'm sorry, go  
01:45PM 20 ahead.

21 MR. GASTEL: So given the window that is  
22 available to us, we may, to the extent that we can, work  
23 this out with the Tennessee defendants. We may be  
24 filing some sort of motion to have them identify on a  
25 limited basis those affirmative defenses that could be



1     cured within the time period provided by the relevant  
2     rules.

3                 THE COURT: All right. Does anyone else  
4     want to be heard on this topic? I think what Mr., is  
5     it, Grossman makes sense, that is, I extend the  
6     deadlines for answers or responses to the master  
7     complaint to January 10th, that I extend first the  
8     December 2d deadline to December 20th and then create a  
9     new deadline of January 10th. That's about the time  
01:45PM 10    frame in my mind that I would like to know whether or  
11    not -- I guess I'd like to know what this litigation is  
12    going to look like.

13                I understand that there are lots of  
14    negotiations under way and that this process is going to  
15    be imperfect and perhaps take longer than necessary, but  
16    I'm increasingly concerned that the mediation and  
17    settlement-type discussions are dragging on, and I would  
18    like to get this case in litigation mode, if that's what  
19    we're going to do, at least as to some cases and some  
01:46PM 20    defendants, and mid-January is about the time frame I  
21    think in which it seems to me it's appropriate to put  
22    this case in full litigation mode if it hasn't been  
23    resolved by then, which is more than two months away.

24                All right. So I will issue that order  
25    extending the deadlines, that is, the November 29th and

1 December 2d deadlines, I think we're out to  
2 December 20th, and then I create a new deadline for  
3 answering or otherwise responding to the master  
4 complaint by January 10th. If there's a specific state  
5 law issue arising in Tennessee or elsewhere, I will wait  
6 to hear a proposal from the parties if resolution can't  
7 be negotiated.

8 Does all of that work, Ms. Parker?

9 MS. PARKER: It does, your Honor.

01:47PM

10 THE COURT: Mr. Grossman?

11 MR. GROSSMAN: Your Honor, I was just going  
12 to ask for clarification. Are you moving the deadline  
13 file short form complaints, the deadline that's the  
14 29th?

15 THE COURT: Yes, that was my intention to  
16 December 20th.

17 MR. GROSSMAN: Oh, to December 20th. Thank  
18 you, that's fine.

19 MS. PARKER: One point of clarification, if  
01:47PM 20 I could, your Honor. Local Rule 15.1 ordinarily  
21 requires providing 14 days of notice when you intend to  
22 amend a complaint to add a party. As I read your  
23 Honor's earlier rulings, there's no need for that to be  
24 done here, but I did want to bring that rule to the  
25 Court's attention.

1 THE COURT: That is certainly true if what  
2 we're talking about is a party amending their complaint  
3 in order to use the short form complaint/master  
4 complaint process. I will -- I do not think it's  
5 necessary to comply with 15.1. Among other things, for  
6 administrative convenience, if nothing else, I strongly  
7 hope that most plaintiffs will adopt the master  
8 complaint or some form of it, and the usual issues with  
9 regard to amendment of the complaint giving the party a  
10 chance to oppose on it on grounds of futility and so  
11 forth I think do not need to be -- to the extent those  
12 issues exist, I can address them in other context  
13 without strictly enforcing Rule 15.1.

01:48PM

14 MS. PARKER: Thank you, your Honor.

15 THE COURT: All right. Unless there's  
16 anything else on item 3; item 4, pending motions,  
17 St. Thomas' motion for reconsideration. I think there's  
18 a further request to extend the deadline.

19 Does anyone want to be heard on that topic?

01:49PM

20 MR. GASTEL: That's probably mine, your  
21 Honor, and this dovetails with the point that I was just  
22 making. We're continuing to work with St. Thomas on  
23 their motion for reconsideration, the talks have  
24 encompassed a very wide range of issues, and it's just  
25 taking us a little time to sort that out. The parties

1 have been very cooperative at this point, and we  
2 continue to try to arrive at agreement on as many issues  
3 that we can agree on, but that's why we sort of  
4 requested an additional extension just because there's a  
5 whole host of issues that we're negotiating.

6 We're making progress, but we just have not  
7 completed that process given the amount of issues that  
8 St. Thomas has put on the table, but, again, like I  
9 said, we continue to work with them, and we hope to  
01:50PM 10 resolve that certainly before the next status  
11 conference.

12 THE COURT: The request is to extend the  
13 date to November 25th, I believe?

14 MR. GASTEL: That's correct, your Honor.

15 THE COURT: Does anyone from St. Thomas want  
16 to be heard on that or representing St. Thomas? Yes.

17 MS. PUIG: Yvonne Puig, your Honor, on  
18 behalf of the St. Thomas entities as well as  
19 Sarah Kelly. Your Honor, what has been represented to  
01:50PM 20 the Court is correct, and we have asked for an extension  
21 of time to November 25th.

22 THE COURT: All right. That motion, which  
23 is Number 543 is granted.

24 MS. PUIG: Thank you, your Honor.

25 THE COURT: Motions to dismiss Alaunus and

1 Ameridose, Ms. Parker. These are the same Alaunus  
2 motions that have been rolled over repeatedly, I think,  
3 is that right?

4 MS. PARKER: That's correct, your Honor.

5 THE COURT: I guess I'll roll them over  
6 again. Some of this may be obviated by the amendment to  
7 the complaint, and what is the Ameridose issue regarding  
8 Nevada cases?

9 MR. MORIARTY: Your Honor, there were two  
01:51PM 10 cases filed in Nevada. They were appropriately tagged  
11 for transfer, but somebody at the JPML clerk's office  
12 must have seen that they had to do cardioplegia solution  
13 and did not transfer them, so we have filed a motion  
14 with the JPL talking about "related to" jurisdiction and  
15 how those cases, except for the specific product, are  
16 exactly the same as everything else and for efficiency  
17 purposes should be tagged and sent here.

18 THE COURT: All right.

19 MR. MORIARTY: That's all briefed, and it  
01:52PM 20 was all agreed to. There's nobody opposing it.

21 THE COURT: All right. In terms of other  
22 pending motions, I looked through the docket, which  
23 always gives me a bit of a scare every time I do that,  
24 but there was a motion to amend the complaint in the  
25 Bland case, which is Number 468.

1 THE CLERK: Attorney Bill Leader should be  
2 on the phone.

3 THE COURT: Bill Leader, are you on the  
4 phone?

5 MR. LEADER: Yes, your Honor, this is  
6 Bill Leader.

7 THE COURT: What is your intention in that  
8 regard? I don't know that it's been opposed yet, but  
9 I'm not sure I know what the issues are.

01:52PM 10 MR. LEADER: This motion is simply to add  
11 St. Thomas Hospital and two St. Thomas entities that  
12 could not be named when the Blands filed their initial  
13 complaint because they had not given the notice required  
14 under Tennessee law at the time to the St. Thomas  
15 entities. They now have. We gave the St. Thomas  
16 lawyers notice pursuant to Local Rule 15.1 and then  
17 waited 14 days and filed the motion, and they have told  
18 us that they do not oppose this amendment insofar as  
19 adding the three St. Thomas entities.

01:53PM 20 THE COURT: That motion is granted,  
21 Number 468, and that's without prejudice to the  
22 plaintiff in that case amending the complaint again to  
23 adopt the short form/master complaint. There's also I  
24 think Number 508, motion to quash a subpoena. If that  
25 hasn't been referred to Magistrate Judge Boal, I now so

1 refer it, and we have the PSC's motion to partially lift  
2 the discovery stay, which is not yet ripe for  
3 resolution, but we probably ought to talk at some point.  
4 I think those are the pending motions. Have I missed  
5 anything, again, in the MDL in the individual cases?

6 All right. Item Number 5, informal  
7 discovery.

8 MR. FERN: Judge, that's my issue.

9 THE COURT: Mr. Fern.

01:54PM

10 MR. FERN: I'd like to report to the Court  
11 that the ongoing, informal disclosure of documents on  
12 behalf of the trustee and NECC have continued since we  
13 were last before the Court. Just a way of total, some  
14 documents are going to the PSC, some are being delivered  
15 to Rust Omni, the HIPAA information and other  
16 information regarding patient identifying information  
17 goes directly to Rust Omni.

18 All in, Judge, to date, we have produced  
19 approximately 4800 documents which encompass about  
20 38,000 pages of the documents. The last production went  
21 out on Friday, mostly including documents that were  
22 subsequently requested by members of the PSC,  
23 Mr. Lipton, in particular, regarding Liberty Industries,  
24 which we note to be one of the defendants that were  
25 named in the master complaint.

01:55PM

1 THE COURT: All right.

2 MR. FERN: Judge, can I go off agenda for a  
3 moment, if I could?

4 THE COURT: Yes.

5 MR. FERN: On a housekeeping matter?

6 THE COURT: Yes.

7 MR. FERN: Per CMO-6, the affiliated  
8 defendants had all agreed to waive formal service of  
9 process. There was a long period of time when I  
01:55PM 10 represented most of the people of the affiliated  
11 defendants. Recently with my appointment by  
12 Judge Boroff, I no longer do.

13 Other gentlemen at the table here,  
14 Mr. Moriarty represents Ameridose, Mr. Thomas on behalf  
15 of GDC, Mr. Gaynor has the individuals, and  
16 Mr. Rabinovitz represents MSM.

17 My firm continues to receive Rule 4 waivers  
18 for service of process because no one out in the  
19 plaintiffs' world knows of the changed circumstance. If  
01:56PM 20 I can, and with Ms. Parker's and the PSC's help, I will  
21 get her tomorrow, if not tomorrow, Monday, a list of all  
22 the individuals in the firms that are authorized to  
23 accept service of process on behalf of these affiliated  
24 defendants.

25 I would ask that the PSC then communicate to



1 the plaintiff bar out there in the world regarding these  
2 modifications so that the Rule 4 service of process are  
3 directed to the right individuals.

4 THE COURT: All right. Ms. Parker.

5 MS. PARKER: The PSC has no objection to  
6 that, your Honor. It occurs to me that it may make  
7 sense to revise CMO-6 so that the order on file reflects  
8 the appropriate entities to be served, but we can  
9 certainly discuss that.

01:57PM 10 THE COURT: I'm certainly happy to do that.  
11 Why don't you perhaps jointly propose whatever  
12 modification you think is appropriate.

13 MR. FERN: Judge, we can do that, but in  
14 looking at CMO-6, it does not say who or what firm or  
15 what individual was directed to accept service, it just  
16 says that formal service would be waived. If the Court  
17 would like a new CMO, we'd be glad to prepare it and  
18 submit it.

19 THE COURT: All right. This triggers a  
01:57PM 20 point that applies not only to this issue but to this  
21 informal exchange of discovery. I very much appreciate  
22 these efforts that make people's lives easier, including  
23 mine, but if we do wind up in full litigation mode, and  
24 it looks like we're heading that way for at least some  
25 member of the defendants, some of these things are going

1 to have to be formalized.

2 I had a case transferred to me in which all  
3 the discovery had been informal, disputes have now  
4 arisen, including late production of documents after the  
5 discovery deadline, people are unhappy, and they say  
6 they want sanctions. I said how can I sanction someone  
7 for failing to produce something when there was never a  
8 document request?

9 I don't know how we're going to handle that  
01:58PM 10 here, but in addition to the obvious, which is you need  
11 to keep track of what is being produced to whom, at some  
12 point we need to come to closure on this issue because  
13 if a dispute does arise as to what documents were  
14 produced or any other issue like that, whether someone  
15 was properly served, I need to have some formality of  
16 the process if I'm going to do any enforcement at all.

17 We may be some ways away from that. I'm not  
18 suggesting any particular procedure. It could be that  
19 through mediation or settlement that some of these  
01:59PM 20 issues disappear, but keep that in the back of your  
21 mind. At some point, we're going to need to make sure  
22 that that base is touched, and if we're going to have  
23 new defendants, like Liberty and UniFirst, and if  
24 they're significant defendants, I don't know if they  
25 are, but I suspect as much, that may change the

1 landscape somewhat as well, but at this stage I'm simply  
2 going to note the issue.

3 Anything else that anyone wants to take up  
4 on what I'll call informal discovery at this point?

5 MS. PARKER: Nothing on informal discovery,  
6 but to backtrack a bit --

7 THE COURT: Yes.

8 MS. PARKER: -- I do not mean to be putting  
9 Mr. Fern on the spot when I raise this question.

01:59PM 10 THE COURT: But you're going to anyway.

11 MS. PARKER: Yes, I'm going to do it anyway,  
12 I guess. We would ask that the previously-served  
13 waivers of service of process that may have been  
14 inadvertently delivered to Mr. Fern, we need not  
15 re-serve those, meaning we have a tremendous number of  
16 plaintiffs, as your Honor knows, that complied with  
17 those procedures set out in CMO-6, particularly with the  
18 Tennessee cases, and we would not want to jeopardize any  
19 plaintiffs.

02:00PM 20 THE COURT: I would hope that would be true,  
21 but you may need to loop in someone else, I don't know  
22 who. Maybe it's somebody else sitting to his right.

23 MR. FERN: Judge, that was not my intention.  
24 I was trying to fix it going forward. The Rule 4  
25 waivers that have come to us in the last three or four

1 weeks, the same day they get flipped and are sent to the  
2 appropriate counsel for their signature.

3 THE COURT: But, in other words, if you want  
4 to button down that no further service is necessary, you  
5 better loop in whoever the current counsel is as well in  
6 that decision, again, just to make sure it's buttoned up  
7 tight.

8 MS. PARKER: Yes, your Honor. Thank you.

9 THE COURT: Again, as this case continues to  
02:01PM 10 grow, making sure we have these details nailed down is  
11 going to be increasingly important.

12 All right. The next item is bankruptcy  
13 proceedings. Mr. Gottfried.

14 MR. GOTTFRIED: Your Honor, the bankruptcy  
15 trustee is continuing his negotiations with the insiders  
16 and keeping both the PSC and the creditors' committee  
17 apprised, and they've been actually active in those  
18 discussions, and he, consistent with the pleading that  
19 we filed, the emergency pleading we filed last week, I  
02:01PM 20 think all the parties remain optimistic that a  
21 resolution is possible, so the settlement aspect  
22 continues to progress.

23 In terms of the rest of the bankruptcy, you  
24 know, the trustee continues to get returns, collect  
25 receivables, pay bills and the like and is proceeding

1     apace.

2                   THE COURT:   And, again, just my view as I  
3     sit here is if we get to the beginning of the year and  
4     we haven't progressed any further, I think enough is  
5     enough, and we need to take the gloves off, so to speak,  
6     and begin full-fledged litigation. I would rather not  
7     get to that point, but I do feel that, you know, the  
8     episodes are more than a year old, the litigation is  
9     approximately the same age, and at some point if we're  
02:02PM 10    going to litigate it, we need to litigate it, and I  
11    think January --

12                  MR. GOTTFRIED:   The trustee shares your  
13    view.

14                  THE COURT:   All right. January is about the  
15    time frame that I'm thinking is -- I feel that that's  
16    where my generosity will begin to expire. Anything else  
17    on the bankruptcy? Does the creditors' committee want  
18    to weigh in here, anyone? Mr. Baldiga.

19                  MR. BALDIGA:   Nothing in addition to that,  
02:02PM 20    your Honor.

21                  THE COURT:   All right. Status of appeals?

22                  MS. PARKER:   I confess that I was remiss in  
23    checking that docket this morning, your Honor, but as of  
24    the last time that I had, there was no further  
25    development.

1 THE COURT: Anyone want to be heard on that  
2 topic? All right. I think that takes us back to item  
3 Number 2, mediation efforts.

4 MS. PARKER: Yes, thank you, your Honor.  
5 This Court entered an order on mediation back in August.  
6 Since that time period, the trustee, the official  
7 committee of creditors and the plaintiffs' steering  
8 committee jointly asked this Court to appoint a mediator  
9 in this matter.

02:03PM

10 Yesterday the Court entered an order  
11 appointing Resolutions, LLC as the mediator, and I'd  
12 like to take a moment, if I may, your Honor, to  
13 introduce we have with us today Ms. Carmin Reiss of  
14 Resolutions, LLC.

15 THE COURT: Good afternoon. You have my  
16 deepest sympathies.

17 (Laughter)

18 THE COURT: Thank you.

02:04PM

19 MS. PARKER: Which I think brings us to  
20 deadlines. There are some mediation deadlines  
21 approaching. Because they're written in a few different  
22 places, I'd like to go through those.

23 THE COURT: All right.

24 MS. PARKER: The deadline for the parties to  
25 meet and confer about procedures that may be necessary

1 to govern any disputes that arise in mediation is  
2 November 11th, 2013. I confess I'm not entirely sure  
3 what that refers to, but I'm sure that Ms. Reiss will  
4 have thoughts, as will participants. We also have a  
5 deadline of November 15th for the fee sharing proposal  
6 regarding mediation, which I know has been in the works  
7 and discussed by all of the relevant parties so far.

8 THE COURT: All right. Those are  
9 approaching rapidly. I'm inferring you think that those  
10 ought to be extended somewhat. November 11th is Monday.

02:04PM

11 MS. PARKER: That's correct.

12 THE COURT: Federal holiday.

13 MS. PARKER: I think a brief extension would  
14 be appropriate, although I have not discussed that with  
15 the trustee, the creditors' committee or Ms. Reiss, so  
16 perhaps it makes sense for us to convene and to suggest  
17 to you what an appropriate brief extension might be on  
18 this.

19 THE COURT: Why don't I do this to give you  
20 some breathing space. Why don't I extend both of those  
21 deadlines a week without prejudice to seeking a further  
22 extension, so November 11th will now be November 18th,  
23 and November 15th will be November 22d, and you can come  
24 back to me if you think you need more time as to that.

02:05PM

25 MS. PARKER: Thank you.

1 THE COURT: Anything further on that topic?

2 MS. PARKER: Nothing from the PSC, your  
3 Honor.

4 THE COURT: All right. Anyone else want to  
5 take up any issues regarding the deadlines, appointment  
6 of a mediator or the mediation process? Again, I'm  
7 going to repeat that mediation is voluntary. It's not  
8 intended to be a club to force people to the table. It  
9 was intended to provide a vehicle for reducing  
10 transaction costs and making the case move forward, if  
11 nothing else, in a somewhat simpler posture, and if it's  
12 not successful, we will move on to a different approach,  
13 but, again, in my view, it is entirely voluntary and  
14 without prejudice to the rights of all parties to  
15 litigate whatever claims or defenses they feel they may  
16 have.

17 MS. DORMAN: Your Honor, Nicole Dorman  
18 representing Liberty Industries.

19 THE COURT: Yes.

20 MS. DORMAN: Since we are recently named in  
21 the master complaint --

22 THE COURT: But apparently not served, is  
23 that right, or you don't know perhaps?

24 MS. DORMAN: No, not served. We were served  
25 with a subpoena early on, which we complied subject to



1 an agreement with the PSC, but we have not been served,  
2 and I know that UniFirst has not yet been served.

3 I realize the deadline for volunteering to  
4 mediate has passed, however, given the allegations of  
5 the master complaint and the upcoming deadlines with the  
6 short form, would your Honor consider late entry? I, at  
7 least, would like to have the opportunity to evaluate  
8 that option with my client.

9 THE COURT: Yes, and I will consider  
02:07PM 10 anything that sounds sensible. The place to start, of  
11 course, is with a meet and confer and see if you can  
12 agree as to what makes sense, but certainly I will make  
13 every effort to be reasonable and to accommodate that.

14 MS. DORMAN: Thank you, your Honor.

15 THE COURT: That obviously will apply to  
16 UniFirst as well.

17 MR. LIPTON: And, your Honor, Marc Lipton --

18 MS. DORMAN: I will relay that to counsel.

19 THE COURT: I'm sorry.

02:08PM 20 MR. LIPTON: Marc Lipton on behalf of --

21 MS. DORMAN: I will report that to counsel  
22 for UniFirst.

23 THE COURT: Yes. Mr. Lipton I think wants  
24 to say something.

25 MR. LIPTON: Yes. It's Marc Lipton on

1     behalf of the PSC, and I was just going to tell counsel  
2     for Liberty that the PSC is happy to discuss this with  
3     them, and now that I'm able to talk with her, we'll  
4     touch base next week.

5                 THE COURT:   Again, I want to give people a  
6     fair opportunity to resolve or reduce the field of  
7     dispute through that process, but it's going to have  
8     limits, and if you can't mediate it, can't settle it,  
9     let's get going.

02:08PM 10                All right.   That seems to be the whole  
11     agenda as proposed.   Is there anything else anyone wants  
12     to take up other than I'll set one more status  
13     conference.   I think I'm seeing you again on  
14     December 13th.

15                THE CLERK:   We have status conferences each  
16     month through March 13th.

17                THE COURT:   Let's do an April status, let's  
18     set one.

19                THE CLERK:   April 11th at 1:30.

02:09PM 20                THE COURT:   April 11th at 1:30.   I'm trying  
21     to do this sufficiently far in advance so that people  
22     can plan, particularly those from out of state.   Does  
23     that work?

24                MS. PARKER:   That works for the plaintiffs'  
25     steering committee, thank you.

1 THE COURT: It's not school vacation week in  
2 Massachusetts, which I think is the week after that.

3 MR. MORIARTY: Peter, what was the  
4 March date?

5 THE CLERK: March 13th.

6 THE COURT: March 13th is the March date.  
7 Other than that, is there anything anyone wants to take  
8 up, anything from plaintiffs?

9 MS. PARKER: No, your Honor, thank you.

02:09PM 10 THE COURT: Bankruptcy counsel?

11 MR. GOTTFRIED: No, thank you, your Honor.

12 THE COURT: Creditors' committee?

13 MR. COREN: No, thank you, your Honor.

14 THE COURT: Any defendant? Anyone on the  
15 phone?

16 (No response)

17 THE COURT: All right. Thank you, all.  
18 That was short and sweet, 38 minutes, and I will see you  
19 in December.

02:10PM 20 MS. PARKER: Thank you, your Honor.

21 (Whereupon, the hearing was adjourned at  
22 2:10 p.m.)

23

24

25

## C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS ) ss.  
CITY OF BOSTON )

I do hereby certify that the foregoing  
transcript, Pages 1 through 36 inclusive, was recorded  
by me stenographically at the time and place aforesaid  
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING  
PHARMACY CASES LITIGATION and thereafter by me reduced  
to typewriting and is a true and accurate record of the  
proceedings.

Dated this November 15, 2013.

s/s Valerie A. O'Hara

\_\_\_\_\_  
VALERIE A. O'HARA

OFFICIAL COURT REPORTER